In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-697

JEMCO, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. During the spring of 1970, the United Steelworkers of America, AFL-CIO, which represents the production and maintenance employees of the Company, a precision machining enterprise, requested negotiations under the wage reopener clause of the then current, three-year contract (Pet. App. 30). On May 1, no agreement having been reached, all 14 of the employees went out on strike (*ibid.*). The contract provided that employees "in the active employ of the company" as of June 30, who had worked at least 1,200 hours during the year, were entitled to a certain percentage of their

earnings in the previous calendar year as vacation pay (A. 55, 57).[1] Although the Company had paid vacation pay to its employees every year since it began operations, Company President Herbert O. Johnson refused the striking employees' request on the ground that the Company was not "legally obligated for payment of vacation pay" (Pet. App. 32; A. 50).[2] At a subsequent negotiating session, Johnson stated that Company legal costs incurred in injunction and damage proceedings against the Union amounted to $1,200,[3] and that, while not legally obligated to make vacation payments, he was prepared to negotiate vacation pay against these legal costs (Pet. App. 32; A. 21-26, 30-31).[4]

The Board found that, "[w]hether or not the contract under which the Union demanded vacation pay had terminated as a result of its own provisions," the record showed that "vacations were a customary condition of employment" and that the Company "at no time has negotiated with a view to removing them as

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[1] "A." references are to the appendix in the court of appeals.

[2] Petitioner's theory is that the contract had terminated, thus extinguishing the Company's legal obligation to pay vacation pay.

[3] Early in the strike, the Company obtained an injunction in a state court against picket line misconduct. The Company also filed a suit against the Union to recover damages for such misconduct, which was unresolved at the time of the Board hearing. (Pet. App. 30; A. 21-23.)

[4] In his summation before the Trial Examiner, President Johnson added (A. 39):

> I will say that if I pursue my damage suit and collect under that then I will pay the vacation pay, because then I will be made whole on what I have suffered because of the illegal acts by the union.

such." The Company simply contended that it "has a right to set off its legal expenses against the money owing the employees as vacation pay." (Pet. App. 33.) Applying the principles enunciated in *National Labor Relations Board* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, the Board concluded that such a setoff demand was not a "legitimate and substantial" business justification for withholding accrued vacation pay from its striking employees, and that the Company thus violated Section 8(a)(3) and (1) of the Act by doing so (Pet. App. 34). The Board ordered the Company, *inter alia*, to pay to each employee the vacation pay due under the collective agreement (Pet. App. 36-37).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 18-26).

2. In *National Labor Relations Board* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, this Court held that an employer violated Section 8(a)(3) and (1) of the Act, when, without a legitimate and substantial business justification, he denied striking employees vacation benefits accrued under a terminated collective bargaining agreement, while continuing to pay such benefits to non-strikers. This case is controlled by *Great Dane*. Here, as there, striking employees were denied accrued vacation benefits which the Company would otherwise have paid them but for the fact that they had gone out on strike. In *Great Dane*, the employer came forward with no justification for thus discriminating against the strikers, whereas here he sought to justify that

discrimination[5] on the ground that misconduct occurring during the strike had caused him legal expenses which he was entitled to offset against the vacation benefits. The only question presented therefore is whether the Board and the court below correctly concluded that the offset of legal expenses was an insufficient justification for denying the strikers the full measure of their accrued vacation benefits.[6] This narrow issue does not warrant further review. In any event, the Board and the court below correctly concluded that the Company was not justified in penalizing its employees in order to recoup its legal expenses against the Union. As the court below stated (Pet. App. 25-26):

> * * * the Company's damage suit in the state court was brought against the Union to recover monies from its treasury for the Company's legal costs and other expenses arising from the allegedly unlawful picket line activities. Nevertheless, Mr.

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[5] As the court below correctly concluded (Pet. App. 21-22), the fact that all of the strikers were treated alike does not bar a finding of discrimination where, as here, their strike activity was the basis for their adverse treatment.

[6] Contrary to the petitioner's contention (Pet. 8-12), it was not necessary to determine whether the Company was contractually obligated to pay the vacation benefits. The Board found, and the court below agreed (Pet. App. 24-26), that the Company fully intended to pay the vacation benefits if it were successful in recovering from the Union or offsetting the expenses of its law suits. *Roegelein Provision Co.*, 181 NLRB 578, relied on by petitioner (Pet. 10-12), is distinguishable. There the contract provision relating to loss of vacation benefits was specifically negotiated with the intention that it would apply to the then pending strike (*id.* at 580).

Johnson attempted to justify the denial of vacation benefits from the employees personally as an alternative method of recovering the same legal costs.

Moreover, the Company admitted that it did not know which employees actually participated in the alleged misconduct (Pet. App. 26), but nevertheless intended to penalize them all.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1972.

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